

GENERAL AGREEMENT ON TARIFFS AND TRADE

RESTRICTED

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Special Distribution

Committee on Government Procurement

DRAFT MINUTES OF MEETING
HELD ON 25-26 MAY 1983

Chairman: Mr. M. Pullinen

1. The Committee on Government Procurement met on 25-26 May 1983.

2. The following agenda was adopted:

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A. Accession of further countries to the Agreement

3. The observer for the Philippines recalled that the Ministerial Declaration of 1982 called for the contracting parties to review the operation of the MTN Agreements and Arrangements, focusing on their adequacy and effectiveness and obstacles to their acceptance by interested parties. She also recalled that some time ago her delegation had held bilateral negotiations with some developed country Parties on the basis of an initial offer of one entity. In response to some of these countries and motivated by a desire to contribute to the liberalization of trade and the establishment of international discipline in the conduct of government purchases, the Philippines had made efforts to improve the offer by including more entities and products. The consultations had been resumed with some developed country Parties but her delegation was disappointed to find that obstacles it had faced in the initial consultations remained. She suggested that in reviewing the operation of the Agreement the Committee might usefully address the adequacy of the Agreement in pursuing objectives set forth therein, as well as the reasons why after almost three years of existence only a few developing countries had so far accepted it. The Philippines had, since its accession to the GATT, taken steps toward trade

liberalization, introducing a tariff reform programme reducing the average level of nominal rates from 44 per cent to 25 per cent, favourably affecting about 85 per cent of its trade with developed countries Parties to the Agreement on Government Procurement. It was with a feeling of regret, therefore, that despite the Philippines' efforts towards freer and non-discriminatory trade it found that in the area of government procurement different yardsticks were being applied to developing countries. In view of the outstanding difficulties, her delegation therefore now found itself further than before from accepting the Agreement.

4. The representative of the United States stated that his delegation had noted with regret the disappointment expressed by the Philippines with respect to the way the process of negotiating access to the Agreement had progressed. It had always been his delegation's desire to move as quickly as possible to bring new countries into the Agreement, and it was particularly interested in seeing the Philippines as member. His delegation intended to work closely and expeditiously with the Philippine delegation to try to overcome any obstacles to its accession.

5. The representative of Japan stated that his delegation much appreciated the strenuous efforts of the Philippine Government to become Party to the Agreement. It was his sincere hope that the Philippines would become Party as soon as possible, thus enhancing further the importance of the Agreement.

6. The Committee took note of the statements made and agreed to keep this item on the agenda for the next meeting.

7. The observer for Israel stated that Article IX:1(b) of the Agreement on Government Procurement provided that a government contracting party to the GATT not a Party to the Agreement might accede to it on terms to be agreed between that government and the Parties. His delegation had therefore informed the Parties to the Agreement in a note dated 25 January 1983, of Israel's intention to explore the possibility of acceding to the Agreement. In accordance with the procedures adopted by the Committee concerning accession of contracting parties to the Agreement (L/5101, Annex II), Israel had held consultations with the Parties on the terms for its accession to the Agreement. These consultations had been successfully concluded; the terms agreed upon were the following:

"1. Israel agrees to apply the Agreement on Government Procurement to the present Parties to the Agreement.

2. Israel accepts the list of entities which has today been circulated in the Committee on Government Procurement and which you have before you, as an integral part of the Agreement in accordance with paragraph 10 of Article IX thereof.

It is Israel's understanding that the present Parties will apply the Agreement to Israel".

8. Israel therefore intended to deposit with the Director-General to the GATT, in accordance with Article IX:1(b) and following a decision by the Committee in accordance with the procedures adopted by the Committee, its instrument of accession which would state the terms agreed.

9. The representative of the United States noted with satisfaction that the entity negotiations with the Government of Israel had been concluded. He was pleased to welcome the first acceding Party since the Agreement had entered into force. He proposed that the Committee accepted the terms stated, so that Israel could participate at the next meeting as a full member.

10. The representative of Austria recalled that he had stated on several occasions his Government's favourable attitude towards further countries acceding to the MTN Agreements. He welcomed Israel's accession.

11. The representative of Singapore also welcomed Israel's accession and expressed the hope that soon more developing countries would be able to join the Agreement.

12. The Committee took note of the statements made, and agreed that the terms of accession outlined by Israel were those which had been agreed with all Parties to the Agreement.

13. The Chairman welcomed Israel as a new Party, noting that he expected the instrument of accession to be deposited very shortly with the Director-General and the Agreement to enter into force for Israel on the thirtieth day following the date of its accession, i.e. the date on which the instrument of accession had been received by the Director-General. This was in accordance with Article IX:3 of the agreement.

14. The observer for Israel expressed his thanks to members for assistance and cooperation. Noting that a major review was to take place at the next meeting, he thought that as the first acceding country since the Agreement took effect, Israel might be well placed to express opinions on how the provisions of the Agreement affected those seeking accession. He added that the proposal to prepare a handbook to the Agreement (see paragraphs 67-72) would certainly make it easier for businessmen and also for other governments to evaluate the Agreement.

15. The Committee took note of these statements.

B. Implementation and administration of the Agreement

(i) European Economic Community

16. The representative of the United States recalled that the Committee had been informed a long time ago of an expectedly rapid and full implementation

¹The instrument of accession was deposited on 30 May 1983.

of the Agreement in Italy. However, an examination of Italian implementation showed that the level of tender announcements by the Italian Government entities remained surprisingly low. Whilst the Federal Republic of Germany had advertised 124 contracts between January and April 1983, United Kingdom 104 and France 85, the figure for Italy was only 28. Moreover, only 54 per cent these 28 cases allowed sufficient time for bidding. He therefore wondered when Italy, which had taken the full benefits of the Agreement, would start granting those benefits which it had agreed to several years ago. Statistics showed that Italy had in fact benefitted from the Agreement vis-à-vis the United States. His delegation did not intend to allow this non-reciprocal situation to last.

17. The representative of Italy stated that the matter raised had been discussed bilaterally between the United States and his competent authorities, which had explained the considerable efforts made in order to eliminate certain previous inconveniences. As the Committee was aware, a remarkable evolution had taken place since 1981, and in no instance now could it be claimed that the rules and spirit of the Agreement were not respected by Italy.

18. The representative of the United States expressed satisfaction with the improvements in implementation which he understood could be expected. However, previous reports on this subject had been to the same effect. He recalled that at the end of 1980, it had been stated that the Agreement was directly applicable under Italian law but that a circular would be issued. In 1981, after the Agreement had come into force, his delegation had discovered some inconsistencies between the legislation and the Agreement and had been told towards the end of that year that the legislation had been changed and inconsistencies removed. He was not aware of in which respect the subsequent legislation had changed Italian law to conform with the Agreement; in fact his delegation was rather more interested in possible practical results. He did not agree that the increase in advertised Code-covered tenders in Italy merited to be considered a remarkable evolution.

19. The representative of the European Communities stated that the new Italian legislation had been examined very closely at Community level; it was in full conformity with the EC Directive which in turn was completely compatible with the GATT Agreement. While certain divergencies might have occurred in the past, this situation no longer existed. He expected a positive effect on the number of tenders published in the future.

20. The representative of Italy added that a new law, dating from March 1983, was directly applicable without requiring a transitional period of implementation. The only exception was the establishment by 1 January 1984 of an office at the level of the President of the Council of Ministers, which would create a complete framework for all government purchases, replacing the general - but not total - responsibilities presently vested in the Ministry of the Treasury. The action taken fully respected the

Agreement and also related to domestic coordination. While the new rules might initially lead to some contracts being retarded, organs of control saw to it that all procurement complied with Italian law and thereby with the Agreement.

21. The Chairman¹ stated that he expected the new legislation to be notified to the Committee.

(ii) Japan

22. The representative of the United States stated that during the period January-April 1983 38 per cent of Japanese contracts had stipulated thirty or fewer days between the time of award and the delivery of products. It was practically impossible for overseas suppliers to fulfil this requirement. Also, Japanese statistics bore out that in many cases in order to make a purchase, Japanese entities had had to go beyond the Agreement because no bids had been submitted. He wondered whether this might not often be due to the delivery requirement.

23. The representative of Japan stated that it was premature to conclude that a causal link existed between the high frequency of single tendering and the delivery date. He was aware of the importance of the delivery date question, but reiterated the importance also of carrying out purchases promptly in accordance with set time-schedules. His delegation was prepared to discuss the matter bilaterally if the US delegation was in a position to give further details concerning concrete cases of shorter delivery dates than thirty days.

24. The representative of the European Communities stated that all the points he had taken up at the last meeting were still valid (GPR/M/7, paragraph 16). He was still expecting reassurance that certain practices would be changed, otherwise he could not but conclude that the Agreement was not being applied in Japan.

25. The representative of Japan stated that the Japanese government procurement system was quite consistent with the spirit and the letter of the Agreement. His delegation was ready, nevertheless, to work with the EC to find appropriate practical solutions to any problems the EC might have and would welcome information on concrete problems that might have been encountered.

¹The Italian text of the Law dated 23 March 1983 has subsequently been notified and is available for inspection in the secretariat (see GPR/14/Add.1).

(iii) United States

26. The representative of the European Communities stated that an improvement had taken place in the United States with regard to bid deadlines. In January/February 1983 around 50 per cent of all projects still had bid times below thirty days. In March/April 1983 this figure had fallen to below 40 per cent. Also, whereas in the first period quite a number of contracts had had time-limits below fifteen days, scarcely any such contracts had occurred more recently. The problem of time-limits which still existed had its origin in the fact that two documents were used - a so-called solicitation and a synopsis published in the Commerce Business Daily. Apparently some agencies counted the thirty-day period from the date of issue of the solicitation, without taking account of the fact that it took some time to publish the synopsis. The EC for its part had added twelve days in order to avoid the problem of publication delays; in Canada, it was declared in the notices that the thirty-day period run from the date of publication. He then turned to the steadily increased use of the labour surplus area preference. If this preference was added to others, such as the small business set-asides and all existing variances of preferential practice, and if the short bid deadlines were taken into account, there were now fewer genuine open contracts in the United States than ever. According to the EC's figures only five truly open contracts had appeared in March 1983 and only thirteen in April. The Commerce Business Daily also showed a growing number of negotiated contracts or contracts listing participants, with the information that the qualification procedures were too long to permit further participation. However, Article V:2(c) of the Agreement stipulated that time should be allowed to permit participation. In the first four months of 1983, there had been twenty-five contracts of this type. Although this was not a high figure, it was almost as many as that for the whole of 1982, and represented a regrettable tendency. He then turned to the practices of the Defence Fuel Service Centre. This agency, which was active in the procurement of product category two (mineral products) - of preponderant weight in total US Code-covered purchases - only identified some of its contracts as being Code-covered. It had awarded some very substantial contracts in 1983 which had not been identified in CBD by way of the appropriate footnote 12. In the particular case of coal, where the EC had won virtually all its contracts in the United States in 1981, the amendment to the Department of Defense Regulations (the "Stevens amendment"), stated that the DOD was not allowed to purchase coal from foreign sources if US coal was available. He asked the US delegation how this was compatible with obligations under the Agreement. Finally, he stated that an increasing amount of Buy American legislation was being put forward. Although this was mostly in areas outside the scope of the Agreement, he wondered nevertheless how this growing legislation could be justified in terms of Article I:2.

27. The representative of the United States stated that considerable efforts had been made to correct the situation of too short bid deadlines and that a number of agencies now provided for 40-45 days between the time the notice was sent to the Commerce Business Daily and the time of the closing date. Some tenders had had very short deadlines because procuring officers had published them under the Agreement while in fact they fell far below the threshold and were normally subject to accelerated procedures. He expected a further improvement to take place regarding bid deadlines. On labour surplus areas, he recalled that the Department of Defence had established a pilot programme in such a way that foreign firms were treated as if they were labour surplus firms. The impression that small business set-asides were increasingly used was erroneous and due to the fact that at one stage some procuring officers had identified set-asides purchases as Code-covered. He believed this problem was now settled. In regard to the increase of negotiated procurement, he looked forward to seeing examples of what the EC had in mind so that the matter could be looked into to see if US regulations had not been complied with; these required that all interested firms had the right to submit bids even if negotiations were underway with other companies. Concerning the identification question, he expressed surprise at the Defence Fuel Centre not having identified purchases as Code-covered, and would look into the matter. With regard to the "Stevens amendment", while his delegation was fully aware of US obligations under the Agreement, the product category 2 purchases referred to consisted almost only of petroleum, and not coal. His authorities were highly concerned about pressures for more Buy-American practices and had undertaken serious efforts to forestall their adoption, for instance, in the case of the Service Transportation Assistance Act. Although the administration had not been successful in all cases, it had fully complied with the information requirements of Article I:2 both with respect to Congress and entities not covered by the Agreement. One of the main reasons for the administration's difficulties had been the buy-national practices of other countries. He was surprised at criticism of practices in non Code-covered areas while at the same time some EC member States were not even fulfilling their obligations under the Agreement. The statistics for 1981 also indicated a clear lack of reciprocity from trading partners, which could feed requests in the United States for further buy-national restrictions. Some of the causes leading to such pressures might hopefully be taken up in the Article IX:6(b) negotiations.

28. The Committee took note of the statements made.

C. Preparations for further negotiations foreseen in Article IX:6(b)

(i) General statements

29. The representative of the European Communities, referring to the secretariat working paper (GPR/W/30) dealing with procedural questions, stated that it raised a problem of a general nature because it dealt with the question of broadening the Agreement but did almost not refer to the aspect of its improvement, each essential to the other and each equally

referred to in Article IX:6(b). For his delegation, improvements had to be considered in parallel, if not before, enlargements of entity lists because of the general opinion in all Parties that their partners did not implement the Agreement in a reciprocal fashion. If this credibility gap remained, each government would have considerable difficulties in working for enlargement.

30. The representative of Singapore shared these views. In the light of the shortcoming of the present system itself, the focus should not be solely on new commitments; in fact other aspects of the negotiations should be set aside to deal with the present implementation problems encountered by Parties. He felt that if the problems created by different interpretations of the various provisions of the Agreement could be resolved and clarified, this would strengthen the business efficacy of the Agreement.

31. The representative of the United States endorsed the comments made, stating that problems with the implementation of the Agreement deserved the same attention as the expansion of the Agreement.

32. The Committee took note of the statements made.

(ii) Entity coverage

33. The Chairman stated that in response to GATT/AIR/UNNUMBERED of 9 March 1983, lists of non-covered entities had been received since the last meeting from the delegation of Switzerland (GPR/W/31), in addition to previous information from Canada, Finland, Sweden and the United States (GPR/W/25, 28, 24 and 26, respectively).

34. The representative of Singapore submitted for circulation to the Committee the list contained in GPR/W/33.

35. The representative of Austria stated that his authorities were about to establish an inventory of entities presently not covered, but under direct or substantial control by the Government. He added that a number of contracts had been awarded by Austrian entities but that with very few exceptions, Austrian enterprises had not obtained awards abroad. This fact could influence opinions and the attitude of his Government in regard to an enlargement of the Agreement.

36. The representative of Norway stated that he expected to be in a position to submit the Norwegian list of non-covered entities in the near future.

37. The representative of the European Communities explained that his delegation had encountered difficulties in establishing a list of non-covered entities, mainly due to the fact that EC member States had largely included government departments in the Agreement already. A possible inclusion of public enterprises raised serious legal problems. Quoting Article I:1(c) he noted that EC member States did not normally control

procurement procedures and day-to-day operations of such enterprises. These difficulties and the possible further delay in submitting a list did not mean, however, that the EC attempted not to deal with the enlargement aspect of the further negotiations; in fact, his delegation was interested in both this aspect and that of improving the Agreement.

38. The representative of Japan stated that his Government's position was that the present Japanese entity coverage was sufficient compared to that of other Parties. He would report for his authorities' consideration the positive attitude of several members in regard to the presentation of lists of non-covered entities.

39. The representative of the United States stated that his delegation faced legal questions similar to those mentioned by the European Communities. Although a few of the US entities listed would probably be difficult to place under the Agreement for legal reasons they had been included because the Committee had requested data for entities under direct or substantial control by governments without reference to whether procurement procedures as such were under their control. He hoped the EC would submit lists without prejudice to their subsequent offers or responses to requests in the negotiations.

40. The representative of the European Communities stated that the non-binding nature of the information collecting exercise was well known but that the problems which he had referred to had to be recognized. His delegation would submit the information as soon as it was available.

41. The Committee took note of the statements made.

(iii) Service contracts

42. The Chairman noted that information under this item had been made available by Canada, Sweden, Switzerland, United Kingdom for Hong Kong, and the United States (GPR/W/25, 24, 31, 32 and 27, respectively).

43. The representative of the United Kingdom on behalf of Hong Kong emphasized that his delegation's submission was entirely without prejudice to any aspect of the negotiations. He recalled that he had previously stated the view that preparatory work in the field of service was without prejudice to whether or not the Agreement would subsequently be expanded to cover services. While his delegation was not taking a position in the matter at this point in time, it maintained that the Committee had to keep in mind the relationship which existed between services in this Agreement and the topic of services under the GATT itself. Observers were perhaps as concerned with this question as many members, and the Committee had to address itself to Article III in the Article IX:(6)(b) context, as stipulated by the Agreement.

44. The representatives of Finland, Japan, Norway and Singapore stated that their delegations' contributions would be circulated shortly (subsequently circulated as GPR/W/34-36).

45. The representative of Finland added that a comprehensive study of all Finnish entities, whether or not covered by the Agreement, had borne out that construction works, which were already open to international competition, represented a remarkable part of service contracts. If such contracts were suitable for inclusion in the Agreement had to be clarified at a later stage.

46. The representative of the European Communities expected a contribution from his delegation to be put forward before the next meeting. He added that the EC had some of the same preoccupations as those of the United Kingdom on behalf of Hong Kong as to the relationship between the potential activity of the Committee and activities elsewhere in the GATT.

47. The Committee took note of the statements made.

(iv) Leasing

48. The Chairman noted that written information on governments' practices with regard to leasing and similar arrangements had been given by Canada (GPR/W/25), EEC (GPR/W/20), Finland (GPR/W/11), Hong Kong (GPR/W/15), Japan (GPR/W/19), Norway (GPR/W/14), Singapore /GPR/M/7, paragraph 45), Sweden (GPR/W/5), Switzerland (GPR/W/31) and the United States (GPR/W/4). He expressed the hope that information be made available by all Parties.

49. No further statements were made.

(v) Lowering of the threshold

50. The representative of the United States stated that it was evident from statistical returns that the threshold had an impact on the application of the Agreement but that there were practical limits to how low it could be set. Following comments at the last meeting, he suggested an analysis of the potential impact on Code coverage if the threshold was reduced to 100,000 SDRs. He had noted the suggestion only to collect value data, but preferred also to include the number of contracts because such information would indicate possible increased administrative burden.

51. The representative of Canada accepted this suggestion, with the understanding that data collection would be without prejudice to negotiating positions.

52. The representative of Sweden, speaking on behalf of the Nordic countries, also agreed with the US suggestion. If sufficient time was given, it should in his opinion also be possible to collect data on the number of contracts.

53. The representative of the European Communities stated that his delegation attached lower priority to this question than to any other within the information-gathering programme. While he understood the interest

expressed in the subject, he stressed that data did presently not exist in the Community, contrary to the US situation where under general regulations a threshold of \$10,000 applied. He was reluctant to accept any time-limits for such a major operation.

54. The representative of Japan stated that his reservation on data collection remained unchanged.

55. The representative of the United States suggested that in these circumstances countries which were willing to exchange data amongst themselves should prepare themselves for such an exchange at the beginning of 1984. He recognized that sampling techniques might have to be used and thought that information might also be obtained from procurement officials in large buying entities, not in precise terms but in terms of rough estimates as to the percentage impact on Code-coverage by a threshold reduction to SDR 100,000.

56. The representative of the European Communities had already reflected on such possibilities and expected that any data from the EC would have to be based on sampling. Despite reservations, if a relatively easy technique could be devised which would lead to reasonably representative data, the EC would be willing to undertake this work. However, further time for reflection was needed.

57. The Committee took note of the statements made and agreed to keep this item on the agenda for the next meeting.

(vi) Procedures for further negotiations foreseen in Article IX:6(b)

58. The Chairman drew the attention of the Committee to a working paper prepared by the secretariat (GPR/W/30), which had been referred to already (see paragraph 29).

59. The representative of the European Communities added that clarifications concerning the text of the Agreement (referred to in paragraph 6 of the document) was but one aspect of the improvement question and that the Committee also had to deal with implementation problems.

60. Following suggestions by the representatives of Singapore and Sweden concerning practical preparations for the next meeting, in particular concerning the adoption of a timetable, the Committee agreed: (i) to formally open the Article IX:6(b) negotiations at the meeting to be held on 2-4 November 1983; (ii) that decisions on procedures would be made at that meeting, including decisions concerning the timetable, such as dates for the tabling of requests, offers and specific proposals; (iii) to invite delegations to submit, prior to the next meeting, any proposals they might have in respect of procedures, including the timetable; and (iv) to request the secretariat to prepare a working paper on procedures, including an outline of a timetable, in the light of the discussion and in consultation with delegations, as appropriate.

61. The Chairman reiterated that Parties had been invited to supply certain information prior to the next meeting on service contracts and leasing, and that they had been invited to do their best concerning information on specific derogations also by November. Some information expected for the present meeting was still outstanding. He urged delegations concerned to do their utmost to provide the information requested before the next meeting.

D. Third Annual Report to the CONTRACTING PARTIES

62. On the basis of a secretariat draft, the Committee adopted its 1983 report to the CONTRACTING PARTIES, on the understanding that the Chairman and the secretariat would make any updating of information or any other technical changes prior to the circulation of the document. (The report was subsequently circulated as L/5503).

E. Preparation of third annual review, including major review of Article III

63. On the Chairman's proposal, the Committee agreed that the detailed background document for the third annual review would follow the same outline as that of 1982 (GPR/16) with the addition of two items, one dealing with preparations for further negotiations, and one with the major review of Article III.

64. In this connection, the Chairman recalled the provisions of Article III:13 and suggested that any reports by Parties pursuant to this Article, be submitted by 1 October 1983.

65. It was so agreed.

66. The Committee further agreed that the secretariat should prepare the background document and that Parties were invited to submit by 1 October 1983 written information containing the items covered to the extent that this had not already been done in the normal course of the Committee's work. The background document would be revised after the review session to take into account any additional points which would give a full picture of the Committee's activities in 1983.

F. Other business

(i) Practical guide to the Agreement

67. The representative of Switzerland recalled his suggestion to establish a practical guide to the Agreement. If a general interest existed, his delegation would propose a list of contents for the Committee to decide on at the next meeting, when it might also discuss the form of the guide. The secretariat might subsequently prepare a draft guide, based on information already at its disposal, to be completed in due course by contributions from delegations.

68. The representative of the United States stated that one of the problems of implementation had been to make business aware of how to make use of the Agreement. He therefore endorsed the proposal, provided GATT financial resources existed.

69. The secretariat informed the Committee that the question of finances arose only at the stage of printing and that this question could be taken up at a later stage.

70. The representative of Canada supported the Swiss proposal.

71. The Chairman noted that any new elements emanating from the negotiations in 1984 might usefully be taken into account before a guide was finalized.

72. The Committee agreed to revert to this item at its next meeting on the basis of suggestions concerning the elements a practical guide might contain, to be put forward by interested delegations in co-operation with the secretariat.

(ii) Panel candidates

73. The Chairman informed the Committee that panel candidates for 1983 had been nominated by Hong Kong, Finland, Japan, Norway, Singapore, Sweden, Switzerland and the United States. Two member States of the EC, i.e. Denmark and the United Kingdom, had also nominated candidates. He expected other delegations to make nominations as well.

(iii) Thresholds in national currencies

74. The representative of the European Communities informed the Committee of an amendment to his delegations's notification (see GPR/W/21/Add.2/Corr.1).

(iv) Nationalizations

75. The representative of Switzerland stated that his delegation intended to raise for discussion in the Committee a problem connected with nationalizations, arising from the fact that when a branch or a private enterprise were nationalized the private sector was reduced and the list of non-covered government procurement entities enlarged. He requested the matter included on the agenda of the next meeting, adding that depending the outcome of the Committee's discussion, it could become an item to be included in the Article IX:6(b) negotiations.

76. The representative of the European Communities stated that the suggestion was unclear to him and wondered whether the Swiss delegation might present it in writing.

77. The representative of Switzerland replied that his delegation would make a written proposal for the next meeting.

78. The Committee agreed to revert to this matter in the light of the written submission to be tabled by Switzerland before the next meeting.

(v) Next meeting

79. The Committee reaffirmed that its next meeting would be held on 2-4 November 1983.